Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and Diversity In Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein
Counsel for the National Cable & Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

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The National Cable & Telecommunications Association (NCTA) hereby submits its reply comments in the above-captioned proceeding.

I. THE PROHIBITION ON EXCLUSIVE CONTRACTS BETWEEN CABLE OPERATORS AND CABLE-AFFILIATED PROGRAM NETWORKS SHOULD SUNSET.

In its initial comments, NCTA showed that the ban on exclusive contracts between cable operators and program networks in which cable operators have an attributable interest must be allowed to sunset under the terms of Section 628 of the Communications Act. All the clear positive trends that made the Commission's decision to retain the prohibition in 2002 a "very close call" have continued and accelerated in the past five years. The competition from DBS and other MVPDs that Congress hoped to jump-start with its program access rules has irreversibly taken hold. And it is no longer the case that cable operators own or have attributable interests in a significant portion of all cable program networks – or of the most frequently viewed networks.

Cable's competitors – large and small – maintain, however, that despite the clear emergence and entrenchment of competition in the video marketplace, the prohibition remains "necessary to preserve and protect competition and diversity in the distribution of video programming."[1] For the most part, their argument boils down to this:

Some number of the diminishing percentage of networks that are owned in whole or in part (even a very small part) by cable operators are "must have" networks for any entity that seeks to provide a multichannel video programming service. If a cable operator were to withhold such a network from any of its competitors, those competitors could not effectively compete. In such circumstances, cable operators would always have incentives to withhold such programming, in hopes of eliminating competition. Therefore, the argument concludes, the rule must stay in effect – presumably forever, or at least so long as cable operators continue to have any ownership interests in any "must have" program networks. As we show below, this argument is both overly broad and underinclusive, besides being irrelevant to the perpetuation of program access.

This is not what Congress had in mind when it adopted the program access rules, and it is not what it had in mind in anticipating that the exclusivity ban would sunset in 2002 – or, at least, at some foreseeable time. The program access rules and the ban on exclusivity do not focus on, and are not limited to, "must have" programming. They apply to *all* program networks that are vertically integrated with *cable operators*. And they do not apply to *any* programming – "must have" or not – owned by *anyone else*.

[1] 47 U.S.C. § 548(c)(5).

To the extent that there is such a thing as "must have" programming, as described by the commenting parties,[2] any denial of that programming to any MVPD would, by definition, have the same crippling effect on competition that they portray, <u>whether or not vertically integrated with a cable operator (or any other MVPD, for that matter</u>). By the same token, exclusive contracts between networks that are *not* "must have" networks and any MVPD have no anticompetitive effects, whether or not the MVPD is a cable operator and whether or not the network is vertically integrated with a cable operator.

In 1992, when there were far fewer cable networks and a much larger portion of then-existing networks were affiliated with cable operators, Congress was concerned that competition to cable would "never get off the ground" without a critical mass of existing networks.[3] And it feared that cable operators could, from the outset, make it impossible to obtain that critical mass by refusing to make their vertically integrated networks available to competitors. So, Congress created a narrow and time-limited restriction on exclusive contracts, which it expected to be sufficient to jump start viable competition among MVPDs. It required only *satellite-delivered* networks *vertically integrated* with cable operators to make their programming available to MVPDs other than cable operators.

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2 *See, e.g.* Comments of RCN Telecom Services at 9; Comments of National Rural Telecommunications Cooperative (NRTC) at 7; Comments of SureWest Communications at 3; Comments of American Cable Association at 6-7; Comments of Coalition for Competitive Access to Content (CA2C) at 9-13; Comments of Broadband Service Providers Association (BSPA) at 4; Comments of United States Telecom Association (USTA) at 14; Comments of OPASTCO and ITTA at 5; Comments of Qwest Communications International, Inc. at 5.

3 *See, e.g.*, Remarks of Rep. Tauzin, 138 Cong. Rec. H6533 (daily ed. July 23, 1992).

As discussed in our initial comments, the two large national DBS companies have not only gotten off the ground, they are soaring to the point where today they are the second and fourth largest MVPDs in the country.[4] This is precisely the outcome that Congress had hoped to achieve with its cable-specific ban on exclusive contracts with vertically integrated networks. Congress' intent cannot, now, be reinvented to mean something else. If Congress had been motivated that a distributor would be denied access to "must have" programming, the law would not have been written as it was. It would not have applied the ban to *all* cable-affiliated satellite-delivered program networks, and it would not have applied it *only* to cable-affiliated networks. It <u>would</u> have contained a qualitative component if not precisely the words "must have."

There is no question that Congress saw the measure as a temporary one, to be lifted after vigorous competition was established in the video marketplace. It never intended the ban to become a permanent regulatory fixture. Thus, arguments that the rules need to remain in place so long as new, additional MVPDs keep entering the marketplace are misplaced.

Nevertheless, the telephone companies – whose revenues, resources, and embedded base of customers dwarf those of the entire cable industry – contend that now that they have decided to enter the competitive video marketplace (after a self-imposed decade-long delay) they are entitled to the same regulatory protections that were designed to give a boost to fledgling video competition in 1992.[5]

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[4] DBS has continued to garner MVPD subscribers at a time when cable television's growth in video customers has remained essentially flat. In fact, in 2006, DBS increased its subscribership by 1.9 million, while cable subscribers overall grew by only 200,000. *Kagan Media Money*, Jan. 23, 2007 at 5 and Jan. 31, 2006, at 4; company reports for EchoStar and DirecTV.

[5] *See, generally,* Comments of Verizon; Comments of Qwest; Comments of USTA.

The telephone companies rely on their shibboleth that DBS is not an effective competitor and that only they can bring real competition to the video marketplace. They cite once again data purporting to show that *wireline* competition to incumbent cable operators seems to have a greater effect on prices than competition from DBS.[6] NCTA has demonstrated over and over again why this argument is fallacious: a study in 2004 of virtually *all* wireline overbuilds shows that the lower prices that such overbuilds have exhibited are the (often, short-lived) result of anomalous circumstances *not* relevant to telephone company competition.[7]

That study, which has never been rebutted, showed that in virtually every case, lower prices – to the extent that they existed – were attributable to situations that had nothing to do with wireline overbuilders being more "competitive" than DBS or other competitors. In many of those communities, the overbuilder erroneously underestimated the effects of DBS on cable prices and services and initially set prices at unsustainable low levels – leading either to rapid price increases or rapid bankruptcy. In other communities, overbuilders were able to charge temporarily lower prices because they had purchased their systems from bankrupt owners at pennies on the dollar, and consequently did not have to recover the full capital expenses of building a system. Other overbuild systems were operated on a not-for-profit basis by municipalities or co-ops. *None of these circumstances would, of course, apply to deep-pocketed telco overbuilders, who are constructing their own facilities, to a large extent on existing plant, who presumably do not intend to operate their systems on a not-for-profit basis*.

6 Comments of Verizon at 5; Comments of Qwest at 3; Comments of USTA at 4-5.

7 *See* S. Wildman, "Assessing the Policy Implications of Overbuild Competition," Attachment A to NCTA Reply Comments in MB Docket 04-227 (2004).

More importantly, regardless of whether overbuilds have more effect on prices than DBS competition, there is simply no basis to say that DBS is not a robust competitor to cable. When the two DBS providers are the second and fourth largest MVPDs, there can be no rational argument that DBS operators do not compete fully with cable.

In any event, unlike the fledgling DBS companies that in 1992 had no assurance that they would be able to reach agreements to carry a critical mass of programming, cable-owned or otherwise, the telephone companies already *have* contracts to carry virtually all the program networks carried by competing cable and DBS systems.[8]

Moreover, with vigorous competition, there is no basis to believe, and no evidence to support a belief, that a programmer that is affiliated with a cable operator would withhold programming from non-cable MVPDs based on affiliation. Among other things, no such programmer could rationally believe that withholding programming would cripple an MVPD that competed with its cable affiliate. On the other hand, such a programmer would clearly lose revenue to its competitors if it declined to enter into such agreements, and this is especially true since no cable operators reach all customers in the United States.

In its Notice, the Commission specifically asked whether cable's competitors in the video marketplace still "lack the resources and ability to develop their own programming,"[9] as may have been the case in 1992. The telephone companies, whose resources tower over those of the

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8 *See, e.g.*¸ Verizon's channel lineup for the Washington, DC metropolitan area, http://www22.verizon.com/NROneRetail/NR/rdonlyres/070523F7-6EC0-43F7-833B-786F3CA58AA1/0/MD_WashingtonMetro.pdf, which lists more than 400 channels of video programming, plus a wide array of video-on-demand programming and 47 music channels.

9 Notice at ¶ 10.

cable operators who invested in and created satellite-delivered cable programming more than 20 years ago,[10] are conspicuously silent on this point, as are the large DBS companies.[11]

In fact, DirecTV has used its resources to acquire exclusive programming, such as the NFL's "Sunday Ticket" package. And where Verizon cannot simply free ride on cable's programming investment – such as cable's investment in local news – they are innovating and creating their own programming, enhancing diversity. For example, Verizon has already launched its first local news channel, "Fios1," in the Washington, D.C. area, presenting local news, sports, weather, traffic and community news. The channel's programming includes news provided from WUSA-TV, the CBS affiliate in the market, sporting events from Georgetown University and George Mason University, high school sports coverage, locally produced news and community features, and professional baseball games.[12] And in an earlier incarnation of Tele-TV and Americast, the phone companies poured nearly half a billion dollars into program production[13] in the mid 1990's.

The point is not simply that new competitors to cable would have the ability and the incentive to create and invest in new programming of their own. It's also that the resources and

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[10] For example, AT&T's current market capitalization is $249 billion, nearly 190 times larger than that of TCI, the then-largest cable operator, in 1985. Sources: AT&T, http://finance.yahoo.com/q/ks?s=t, Apr. 3, 2007 (closing price of $39.90 times 6.24 billion shares outstanding) compared to TCI's $1.298 billion market capitalization as of Dec. 31, 1985 (1986 Kagan Financial Databook at 114).

[11] In fact, the largest DBS provider today is nearly three and one half times larger than was TCI, the largest cable operator in 1985. Kagan Cable TV Financial Databook (June 1986).

[12] *See* "Verizon FiOS to Launch TV News Channel," *Mediaweek*, March 29, 2007, http://www.mediaweek.com/mw/news/tvstations/article_display.jsp?vnu_content_id=1003565243.

[13] *See* Grebb, "The Romance and Wreck of TELE-TV," *Wired (*beta version), Dec. 9, 1996.

ability of the telephone companies and DBS companies – and other media companies, as well – to create new alternatives to existing programming lessens any incentive and ability of programmers affiliated with cable operators to use exclusivity to harm the competitors of their cable affiliates. There is no remaining justification for a one-sided ban that prevents *every* cable-affiliated network from entering into an exclusive contract with *any* cable operator, even where such exclusivity does nothing to harm and may promote competition among programmers or MVPDs.

New entrants to the already competitive video marketplace can play a useful role if they are able to meet the demands of consumers more efficiently and more effectively than existing competitors. But competitors, new and old alike, should win or lose customers on the basis of their ability to offer the most value to consumers – and not because of artificial regulatory interventions that distort the marketplace.

II. CONTINUED ENFORCEMENT OF THE EXCLUSIVITY BAN RAISES SERIOUS FIRST AMENDMENT PROBLEMS.

There is no question that the First Amendment applies to cable operators and program networks;[14] and that the First Amendment guarantees to speakers the manner of how to speak and publish as well as the right to withhold one's speech from a potential distributor. Compelled association with speakers is strongly disfavored[15] both as a matter of free speech and copyright law.

14 *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) ("Cable television partakes of some of the aspects of speech and the communication of ideas as to the traditional enterprises of newspaper and [book publishers].") Distributors of protected content enjoy the rights of the content providers, *Bantam Books, Inc. v. Sullivan*, 372 U.S.58 (1963).

15 *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

From its inception, the forced-sale requirements of Section 628 have implicated the constitutional rights of speakers by requiring, say, a satellite-delivered news or public affairs channel owned by a cable operator to sell its content to any qualified distributor. By 2007, the justification for such a forced-sale doctrine – priming the pump for a competitive MVPD market circa 1992 – has long since dissipated. Moreover, as noted earlier, even if there were still some resilience to this government interest, the method by which Section 628 seeks to address it would be under-inclusive and over-inclusive. Programming that some might call "must have" may not be in the ambit of "satellite delivered, vertically integrated programming;" and some networks that fit that characterization would not reasonably be considered "must have."

It is true that the court of appeals rejected a facial challenge to the constitutionality of the program access rules. But in applying an intermediate scrutiny test to the rule, the court based its decision on the factual balance before Congress in deciding on the rule: "Congress considered [the First Amendment] argument and concluded that the benefits of these provisions – the increased speech that would result from fairer competition in the video programming marketplace – outweighed the disadvantages – the possibility of reduced economic incentives to develop new programming. *See* S. REP. NO. 92, *supra*, at 26-28, *reprinted in* 1992 U.S.C.C.A.N. at 1159-61."[16]

Those benefits of the provision – that there would be "fairer competition in the video marketplace" – have been achieved, given DBS's substantial MVPD presence and the entry of deep-pocketed telco providers. Accordingly, given the vigorous MVPD competition documented

[16] *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

by the FCC for the past five years, the government interest that led to Section 628's exclusivity ban no longer exists. There is no rational basis to think that DBS, ILECs or other MVPDs will be put out of business by sunsetting the rule. Accordingly, the rule fails for want of a substantial government interest, given the undeniable First Amendment impingement of the rule. And, furthermore, it fails because it is not tailored to meet the purported interest for which it was devised fifteen years ago.

III. THE FCC SHOULD MAINTAIN ITS CURRENT PROGRAM ACCESS PROCEDURES.

NCTA's initial comments showed that the existing program access procedures were working. Since the FCC's comprehensive procedural review in 1998, relatively few complaints have been filed, and no violations have been found. NCTA noted that those procedures were designed to expedite resolution of program access complaints, as Congress intended in Section 628.

Several commenters urge the Commission to further expedite adjudication of program access complaints. But commenters also propose additional procedures and processes that inevitably will prolong the time for resolving these issues and will impose unnecessary costs and burdens on cable programmers and operators.

A. There Is No Need to Change the FCC-Controlled Discovery Process

EchoStar argues for a wholesale rewrite of the program access discovery rules, which currently allow discovery only when ordered by the FCC. EchoStar claims that "discovery should be the rule, not the exception…"[17] It proposes that the FCC at a minimum require cable programmers "to provide at least six carriage contracts for the cable network in question from

[17] EchoStar Comments at 26.

both affiliated and non-affiliated MVPDs with their answer."[18] AT&T, meanwhile, suggests that program networks, simply based on the allegations of a complaint, should be "required to produce, either with its answer or upon service of appropriate discovery under the formal complaint rules, copies of other contracts entered into for the programming at issue."[19]

Proponents for these proposals, which would automatically force programmers to disclose highly confidential information to an MVPD customer, present nothing new in their support. The Commission already thoroughly considered and rejected similar suggestions for discovery as–of-right in 1998, deciding to retain the system of FCC-controlled discovery.[20] The FCC reasoned then that "given the sensitive and proprietary nature of the information involved in program access matters, expanded discovery would inevitably devolve into Commission-controlled discovery."[21] And the agency recognized that "expanded discovery rights would be more likely to encumber and lengthen resolution time for program access proceedings" while at the same time failing to "enhance the process of substantively adjudicating these cases."[22]

The comments in this proceeding provide no reason for altering this sound decision.[23] The rules already provide complainants with built-in protections to obtain the information

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18 *Id*. at 27.

19 AT&T Comments at 31. EchoStar also seeks the right to automatically propound interrogatories at the same time it files its complaint.

20 *Ameritech Order*, 13 FCC Rcd. 15822, 15848 (1998).

21 *Id*. at 15848-49.

22 *Id.* at 15849.

23 USTA argues that "the factors that guided [the FCC's Ameritech Order] no longer hold. Program access disputes have become more subtle and more fact-dependent, necessitating a system of mandatory production of evidence, to be followed – where necessary – by party-initiated discovery." USTA Comments at 21. But the Commission was well aware of the potential for program access complaints based on discrimination claims when it affirmed the use of Commission-controlled discovery in 1998. *See Ameritech Order*, 13 FCC Rcd. at 15849 (declining to adopt different standards of discovery for different types of program access complaints, and noting that "the Commission has ordered discovery in two price discrimination proceedings, and the Commission will continue to order parties to provide the information necessary to resolve complaints at issue.")

necessary to make a prima facie program access discrimination case,[24] and the FCC already retains the authority to order discovery where it deems it necessary.[25]

B. The Commission Should Reject Arbitration Proposals.

Another proposal advanced by those advocating further intrusions into the programming marketplace concerns mandatory arbitration.[26] This is an equally wrongheaded approach. NCTA's initial comments showed that arbitration is an unnecessary additional layer of process that will simply delay the resolution of complaints. The FCC is uniquely qualified to resolve program access disputes, which arise under a complicated set of rules fashioned by the agency to implement Congress' intent.[27]

As we pointed out, the Commission already has procedures in place that allow parties to *agree* to invoke alternative dispute resolution ("ADR") to resolve certain factual disputes in lieu of referral to an administrative law judge. This is consistent with the FCC's ADR policy which, as Comcast's Comments point out, relies on ADR as a "purely voluntary" measure.[28] The ADR provision of the Administrative Procedure Act similarly makes clear that ADR is only

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[24] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd. 3359, 3419 (1993) (in complaints regarding discrimination, in the absence of rate card or other comparative rate information an aggrieved MVPD may file a complaint based on information and belief); 47 CFR § 76.1003(c)(4).

[25] *See* 8 FCC Rcd. at 3420-21 ("If the staff determines that the complainant has established a prima facie case, and further information is necessary to resolve the complaint…, the staff will issue a ruling to that effect. The staff will then determine what additional information is necessary, and will develop a discovery process and timetable to resolve the dispute expeditiously.")

[26] RCN Comments at 20-21; Comments of Broadband Service Providers Association at 7-14; Comments of EchoStar at 18-24.

[27] 47 CFR § 76.1003.

[28] Comcast Comments at 29 (citing *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, 6 FCC Rcd. 5669, 5670 (1991)).

permissible if "the parties agree to such proceeding,"[29] which are "voluntary procedures which supplement rather than limit other available agency dispute resolution techniques."[30]

Certain commenters, though, propose that the FCC go much farther and *require* arbitration in all program access complaints[31] or in those that involve "prices, terms and conditions of carriage of programming,"[32] if the complainant so chooses. Whatever the breadth of the Commission's general rulemaking authority as argued by BSPA and EchoStar, it has no authority to adopt these one-sided arbitration rules. A party cannot be involuntarily subjected to arbitration of these complaints.[33]

NCTA also pointed out that the FCC has no authority to subdelegate its statutory obligation to resolve program access complaints.[34] EchoStar and BSPA try to distinguish this settled principle, claiming that the FCC can delegate fact finding to an arbitrator.[35] Even under their erroneous reading of the Commission's ability to delegate its responsibilities in this area to an outside third party arbitrator, though, commenters include FCC review of the decision of any arbitrator as a necessary element of their arbitration scheme.[36] As NCTA's initial

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29 5 U.S.C. § 572(a).

30 *Id*., § 572(c).

31 EchoStar Comments at 19 (proposing that "competitive MVPDs" should be given the alternative of seeking arbitration or filing a complaint).

32 BSPA Comments at 9.

33 *See* Comcast Comments at 29-30.

34 NCTA Comments at 12.

35 EchoStar Comments at 23-24; BSPA Comments at 12-14.

36 EchoStar Comments at 22-24 (proposing arbitration procedures modeled on News. Corp./Hughes merger, and arguing that FCC retains final reviewing authority); BSPA Comments at 14 (arguing there is "ample precedent" to delegate adjudications to independent third parties, "subject to ultimate Commission oversight").

comments showed, outsourcing these responsibilities to a third party will not save time and, in fact, required FCC review post-arbitration can add months to resolution of a program access complaint.[37] The interest in expeditiously resolving these cases would be seriously undermined by an arbitration requirement. And there is no evidence in the record of deficiencies in current fact-finding in FCC-handled cases that would warrant this change.

Finally, certain commenters propose that the program access rules be modified to impose a "standstill agreement" pending resolution of a complaint by an arbitrator or the Commission.[38] This extraordinary upending of the right to contract – and of the ability of complainants to establish unilateral government takeover of distribution arrangements *pendente lite* – is not found in Section 628 or any other U.S. law. The FCC lacks statutory authority to impose this type of remedy, based on a mere allegation of a rule violation.

Even if the Commission did have this power, it should not use it in the manner proposed by commenters. Such a rule would provide multiple opportunities for abuse and gamesmanship. And it would reduce incentives for mutually acceptable agreements to be reached at the bargaining table, rather than at the Portals.

IV. SECTION 628 DOES NOT APPLY TO CONTRACTS BETWEEN CABLE PROGRAM NETWORKS AND THIRD PARTIES THAT INTEND TO REDISTRIBUTE THE PROGRAMMING THROUGH "TRANSPORT" ARRANGEMENTS OR "SHARED HEADENDS".

Certain commenters urge the Commission to force programmers to permit third parties (who may or may not qualify for MVPD status) to further distribute such programming to other parties, either through "transport" arrangements or via "shared" headends.[39] Such proposals are

[37] NCTA Comments at 14 (merger conditions provide one month to file from arbitration's decision and four months for *de novo* FCC review).

[38] BSPA Comments at 15; USTA Comments at 27-29;

[39] *See* NTCA Comments at 6-7, OPATSCO Comments at 8, NRTC Comments at 5-6.

beyond the scope of this proceeding and are not within the Commission's authority under Section 628.

The program access rules are limited to contractual relationships between covered programmers and MVPDs that intend to provide such programming directly to subscribers.[40] Section 628 was never intended to require programmers to deal with third parties seeking to redistribute or resell such programming to others (who may not even qualify as MVPDs or have an affiliation agreement with the affected programmer). Indeed, control over the technical facilities used to distribute programming to MVPDs is vital to a programmer's ability, *inter alia*, to prevent unauthorized distribution, ensure technical quality and enforce blackout restrictions imposed by content owners – precisely the kinds of factors programmers are allowed to take into consideration under the program access rules.[41]

CONCLUSION

The level of competition in today's video marketplace, in which consumers throughout the nation can choose from among *at least* three providers of multichannel service, and in which, in addition, large telephone companies and cable operators are competing in the provision of voice, data *and* video service, far exceeds what Congress could reasonably have expected in 1992. Congress was worried that by denying access to vertically integrated, satellite-delivered programming, cable operators could prevent any of its nascent competitors from getting off the ground. It did not intend for the prohibition to survive in the irreversibly competitive marketplace that currently exists.

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[40] *See, e.g.*, 47 CFR § 76.1003(e) (defining MVPD as entity engaged in the sale of video programming to "subscribers or customers"); 47 CFR § 76.1003(a) (limiting standing to file program access complaints to MVPDs).

[41] *See, e.g.*, 47 C.F.R. § 76.1002(b) and accompanying notes.

With respect to procedures for enforcing all the program access rules, there is no evidence of a problem that needs to be solved. The rules already ensure expedited consideration of complaints, and the changes suggested by some commenting parties – especially, mandatory arbitration – are not only unauthorized but would *impede* the expeditious resolution of disputes.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

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